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Supreme Court of the United States

OCTOBER TERM, 1957

COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, VIRGINIA, and THOMAS J. McILWAINE, DIVISION SUPERINTENDENT OF SCHOOLS FOR PRINCE EDWARD COUNTY, VIRGINIA,

Petitioners,

v.

EVA ALLEN, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Dated December 31, 1957

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PETITION FOR A WRIT OF CERTIORARI

I.

INTRODUCTION

The County School Board of Prince Edward County, Virginia, and Thomas J. McIlwaine, Division Superintendent of Schools for Prince Edward County, Virginia, hereby petition that a writ of certiorari issue to review a decree of the United States Court of Appeals for the Fourth Circuit entered on November 11, 1957. That decree reversed an order entered by the United States District Court for the Eastern District of Virginia, Richmond Division, on March 26, 1957, denying for the time being a motion for further relief filed by the plaintiffs. The Circuit Court remanded the case to the District Court for further proceedings.

II.

OPINIONS BELOW

The opinion of the District Court (Appendix A) is reported at 149 F. Supp. 431. The opinion of the Circuit Court (Appendix B) has not yet been reported.

Prior proceedings in this case are as reported as follows:

ACTION	DATE	REPORT
Decree of 3-judge District Court denying relief	March 7, 1952	103 F. Supp. 337
Probable jurisdiction noted	October 8, 1952	344 U. S. 1
Assigned for reargument	June 8, 1953	345 U. S. 972
Reversed in principle and assigned for reargument	May 17, 1954	347 U. S. 483
Continued	November 22, 1954	348 U. S. 886
Decision as to relief	May 31, 1955	349 U. S. 294
Dissolution of 3-judge District Court	July 17, 1956	142 F. Supp. 616

An order entered July 18, 1955, by the three-judge District Court on the mandate of this Court is unreported.

III.

JURISDICTION

The opinion of the Court of Appeals is dated November 11, 1957. On December 3, 1957, the Court of Appeals stayed issuance of its mandate on the condition that this Petition be filed within 30 days thereafter. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

IV.

QUESTION PRESENTED

Only a single question is presented by this case:

> In the light of the broad range of judicial discretion granted to District Courts by this Court in its 1955 school segregation decision, was the Circuit Court justified in reversing the action of the District Judge who, on the basis of the facts of record here, refused to order immediate integration in the public schools of Prince Edward County, Virginia?

We submit that the order of the District Judge was proper and that the Circuit Court exceeded its prerogative in setting it aside. Accordingly, the action of the Circuit Court should be reversed.

V.

STATEMENT OF THE CASE

This is one of the original five school segregation cases that came before this Court for three successive terms. As

the Court is well aware, in two opinions the original decision of the three-judge District Court was reversed and the case was returned to the District Court for action in conformity with this Court's second full opinion.

When the matter came back to the three-judge District Court, a number of pleadings were filed (P. A. 1-13[1]). On July 18, 1955, the three-judge District Court entered a final decree as follows:

> "That the defendants be, and they are hereby, restrained and enjoined from refusing on account of race or color to admit to any school under their supervision any child qualified to enter such school, from and after such time as the defendants may have made the necessary arrangements for admission of children to such school on a non-discriminatory basis with all deliberate speed as required by the decision of the Supreme Court in this cause; but the court finds that it would not be practicable, because of the adjustment and rearrangement required for the purpose, to place the Public School System of Prince Edward County, Virginia, upon a non-discriminatory basis before the commencing of the regular school term in September 1955 as requested by the plaintiffs, and the court is of the opinion that the refusal of the court to require such adjustment and rearrangement to be made in time for the said September 1955 school term is not inconsistent with the public interest or with the decision of the Supreme Court. . . ." (P. A. 15)

No appeal was taken from that final order but the matter was retained on the docket. There the matter rested for

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[1] The initials P. A. refer to the Appendix to the Brief for the Appellants (now Respondents) in the Circuit Court; the initials A. A. refer to the Appendix to the Brief for the Appellees (now Petitioners) in that court.

nine months. Then the Respondents, on April 23, 1956, filed a Motion for Further Relief (P. A. 15-24). This motion is the origin of the present appeal. The pleading was a long one. It reviewed prior proceedings in the case. It came then to a review of action considered by the Respondents to be relevant that had been taken by the Commonwealth of Virginia during the preceding nine months. It asserted that no additional time was necessary "in the public interest" in order to effect desegregation (P. A. 23). It accordingly requested immediate desegregation effective with the opening of the schools in the fall of 1956 (*ibid.*).

The Petitioners answered this pleading by a showing of facts (P. A. 24-7; A. A. 12-26). The pattern of State action was reviewed, and developments in Prince Edward County were detailed for the District Court. These facts are set forth at length in the appendix to the brief filed by the Petitioners in the Circuit Court, and they constitute, of course, the factual basis for the decision of the District Court.

The three-judge District Court met and dissolved itself on its own motion since no issue of the constitutionality of a statute remained. Before any decision by the single District Judge, the Petitioners filed a further motion. In it, they asserted that the Respondents had failed to exhaust administrative remedies provided by recent Virginia legislation and to seek remedies available to them under the final order then existing (P. A. 28). The case was then argued and submitted.

The opinion of the District Court is a very careful and thorough one (Appendix A). The Court first reviewed prior proceedings in the case and then came to the recent Virginia legislation. The conclusion reached was that, on

the record as it then was, the effect of those statutes was not before the Court.[2] The District Court then passed to the propriety of granting to the Respondents the specific relief that they sought. The breadth of discretion permitted by the Supreme Court in the light of varying local conditions was detailed. The Court then reviewed conditions in Prince Edward County and the problems presented for its schools. It was clear from the record that, regardless of State statutes, the schools would be closed entirely if integration were to be required. The effect on children and teachers of abandonment of the public schools was weighed. The conclusion reached was that the dangers of granting relief much outweighed the asserted losses of the Respondents. The allowance of additional time was held "imperative." Compliance in future was expected if reasonable time is allowed. Accordingly, no action on the Motion for Further Relief was taken, but the Respondents were given leave to renew it in the future.

This opinion was handed down on January 23, 1957. An order conforming to the opinion was entered on March 26, 1957 (P. A. 48). An appeal was promptly taken to the Circuit Court. That court reversed the District Court, holding that the latter was in error in not fixing a time limit for compliance with the order requiring integration (Appendix B). The court went on to say that voluntary segregation was not constitutionally offensive and that the completion of integration might be postponed if a start is made. It, accordingly, remanded the case to the District Court with directions to the latter to require the Petitioners to make a prompt and reasonable start on the road to integration of the races in the public schools.

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[2] Those statutes and their effect on this case are not presently in issue here.

VI.

THE REASONS FOR THE ALLOWANCE OF THE WRIT

This Court states that when a Circuit Court has decided a federal question in a way in conflict with applicable decisions of this Court, a proper case for review by this Court is presented (Rule 19(1)(b)). Such a case is this, for here, we submit, the Circuit Court did violence to the rule adopted by this Court in this very case (349 U. S. 294 (1955)). The reasons for our position may be briefly stated.

When this case came on for final reargument on the nature of the remedy, a number of alternate proposals had been suggested by the Court. These varied in degree from the entry of a final decree by this Court itself (with or without the assistance of a special master) to remand of the case to the District Court for consideration in the light of the principles announced by this Court and conditions in the locality where the case arose.

This Court refused to take hasty or generalized action; it recognized that any single rule was impossible. It accordingly remanded the case to the District Court for discretionary action. Its reasons for doing so were made clear:

> "Full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibilities for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. Because of their proximity to local conditions and the possible need for further hearings, the courts which

originally heard these cases can best perform this judicial appraisal. Accordingly, we believe it appropriate to remand the cases to those courts." (349 U. S. at p. 299)

This Court was content to give only general directions to the District Courts:

"In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of these traditional attributes of equity power. At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis. To effectuate this interest may call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in our May 17, 1954, decision. Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner. But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them." (*Id.* at p. 300)

These were the rules that the District Court was to apply. The District Court understood them well; it referred to this Court's language as to the variety of local conditions and problems and continued:

"Bearing in mind that the only legal issue in this case pertains to a right guaranteed by the Constitution, this language coupled with the action of the Court, takes on significance which can hardly be over emphasized. It is elementary law that one deprived of a right guaranteed by the Constitution ordinarily is afforded

immediate relief. Notwithstanding this fundamental principle, the Supreme Court in this case has seen fit to specifically declare that while the plaintiffs are entitled to the exercise of a constitutional right, in view of the grave and perplexing problems involved, the exercise of that right must be deferred. With that declaration the Court used equally forceful language indicating that it realizes that conditions vary in different localities. Consequently, instead of simply declaring the right and entering a mandate accordingly, it has seen fit in the exercise of its equity powers to not only defer until a later date the time when the right may be exercised, but to clearly indicate that the time of exercising such right may vary with conditions. A realization of the effect of this action on the part of the Court is of supreme importance to an understanding of the course to be pursued by the Courts of first instance. At the risk of being repetitious, I again recall that: Before laying down those principles, the Court considered and rejected the suggestion that negro children should be forthwith admitted to schools of their choice; rejected the suggestion that it formulate detailed decrees; rejected the suggestion that a special master be appointed by it to hear evidence with a view to recommending specific terms for such decrees and adopted the proposal that the Court in the exercise of equity powers direct an effective gradual adjustment under the order of the Courts of first instance. Further, the Court considered and rejected the suggestion that a specified rule of procedure be established for the District Courts but placed upon those Courts the responsibility of considering, weighing and being guided by conditions found to prevail in each of the several communities to be affected by their decrees."

The District Court then passed to a formulation of the rule established by this Court. It did this with great care as follows:

"Boiled down to its essence, in the Second Brown Case the Court after pointing out that the local school authorities have the primary responsibility of finding a solution to the varied local problems, proceeded to observe that the District Courts are to consider whether the actions of the local authorities are in good faith; and that by reason of their proximity to local conditions those Courts can best appraise the conduct of the local authorities. It is then pointed out that in so appraising, the Courts should be guided by the traditionally flexible principles of equity for adjusting and reconciling public and private needs. To be considered is the personal interest of the plaintiffs, as well as the public interest in the elimination of obstacles in a systematic and effective manner. During this period the Courts should retain jurisdiction of the cases. The Court has here clearly and in unmistakable terms placed upon the District Judges the responsibility of weighing the various factors which prevail in the respective localities affected. There is here a recognition of the obvious fact that in one locality in which conditions permit, a change may be effected almost immediately. In other localities a specified period appropriate in each case may be feasible and a definite time limit fixed accordingly. In yet other communities a greater time for compliance may be found necessary. It is clear that the Court anticipated the application of a test of expediency in such cases so that an orderly change may be accomplished without causing a sudden disruption of the way of life of the multitude of people affected." (P. A. 389)

This was the District Court's analysis of the rules established by this Court. It was a correct analysis. This Court intended that local courts with intimate knowledge of local conditions should have the broad discretion required to apply the general principle that it had established to the facts of a particular situation.

The District Court turned then to the facts of Prince Edward County to which the principle established by this Court had to be applied. It found Prince Edward County to be a locality which has slowly but steadily made an economic recovery from the poverty which prevailed there following the War Between the States. It found that racial relations have improved in recent years and that school facilities now provided for Negro children are equal or superior to those for the white. But public sentiment has changed sharply since the Supreme Court acted, and the school authorities have been hard pressed to keep open the public schools of the County. These officials have no taxing power under Virginia law and, while they prepared and submitted annual budget requests to the Board of Supervisors (the County tax-levying body), funds have been appropriated to the school authorities only on a month to month basis. Moreover, the Board of Supervisors has publicly announced its intention to cut off further appropriations if the County schools are mixed racially at this time. More than 4,000 residents of the County have signed a petition supporting this position of the Board of Supervisors; they are elected, but the school officials are not. The total population of the County is about 15,000 (A. A. 17), so the signers were more than a quarter of all the people. Tentative and substantial plans have been made for a private school system for white pupils in the event of immediate integration, but no similar provision has been made for the Negro. The District Court found it uncontroverted that race relations were more strained than at any time during the present generation. It further found as a fact that, if the requested relief were granted, permanent injury to children of both races would result. It concluded:

> "A sudden disruption of reasonably amicable racial relations which have been laboriously built up over a period of more than three and a quarter centuries would be deplorable. At any reasonable cost, it must be avoided."

This does not mean inaction for an indefinite period. The District Court said:

> "I believe the problems to be capable of solution but they will require patience, time and a sympathetic understanding. They cannot be solved by zealous advocates, by an emotional approach, nor by those with selfish interests to advance. The law has been announced by the Supreme Court and must be observed but the solution must be discovered by those affected under the guidance of sensible leadership. These facts should be self evident to all responsible people."

And it added:

> "Many minds are now engaged in seeking an equitable solution to the problem. . . . It is inconceivable that any of the litigants or other persons affected would willingly see the public school system abolished or an interruption in the education of the children of the county."

The District Court concluded that the appellees "have done all that reasonably could be required of them in this period of transition." That result of necessity follows because:

> "It is imperative that additional time be allowed the defendants in this case, who find themselves in a position of helplessness unless this Court considers their situation from an equitable and reasonable viewpoint."

This is an impressive and thoughtful review of local conditions and an explicit application of the principle established by this Court to those conditions. We turn now to the action of the Circuit Court.

That court made, in essence, only one determination. It said:

> ". . . we think that the District Judge was in error in not fixing a time limit for compliance with the order theretofore entered in the cause."

On this ground the thoughtful action of the District Court was reversed and the case was remanded.

This is the only Virginia school case where the uncontradicted evidence shows that all public schools in the area will be closed if the action ordered by the Circuit Court is carried out. This will result, we state with emphasis, not because of State statutes but because of united local sentiment that will cut off all local funds for the support of the schools. The District Court was well aware of this fact; the Circuit Court merely says that integration must be ordered at once regardless of this fact. It is clear, we submit, that the Federal courts assume a terrible responsibility when they order the closing of public schools. That is what the Circuit Court has done and what this Court will do if the order appealed from here remains in effect. Judges as men must ponder long before acquiescing in this action; theirs is the responsibility for the future of the youth of Prince Edward County.

The question before the Circuit Court was solely whether the District Court had abused its discretion. This Court had established in this case that no fixed time limit was required; the District Court observed the words of this Court and concluded that for the present a fixed time limit

was improper in the facts of this case. The Circuit Court, remote from the scene and unfamiliar with local conditions, says simply that a fixed time limit is required. Virginia's problems, already acute, become critical indeed if the rule of the Circuit Court is the law of the land.

In other situations, the Circuit Court has dealt more tenderly with District Courts. Where District Judges ordered integration, as in Arlington, Charlottesville, Newport News and Norfolk, the Circuit Court found no abuse of discretion.[3] It applauded the action of those courts. Discretion is, however, an area and within that area judges are entitled to form their own opinions; it is not a one-way street. This Court conferred discretion on the District Courts; the Circuit Court says only that integration must come at once.

Those who are familiar with conditions in Prince Edward County or who have read the record in this case will immediately realize that conditions there are difficult in the extreme. The District Court has weighed the factors that it was instructed to weigh by this Court. These factors include the right of Negro children to attend integrated schools as soon as feasible, the overall public interest involved, the necessity for adjustment in attitudes, and the planning required to devise an integrated system. It very properly concluded that integration should not come here at once. This is not due to any fault on the part of the school authorities. Indeed, they are responsible community leaders who have had to fight to keep the public schools of the County open in any manner. This fight has had to be carried on without tax-levying powers and within the framework of State law. The Circuit Court simply cast all this aside as irrelevant.

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[3] *School Board of Charlottesville* v. *Allen*, 240 F. 2d 59 (4th Cir., 1956), cert. denied, 353 U. S. 910, 911 (1957); *School Board of Newport News* v. *Atkins*, 246 F. 2d 325 (4th Cir., 1957), cert. denied, 26 U.S.L.Week 3128 (U.S. Oct. 21, 1957) (No. 361).

The action of the Circuit Court is not merely wrong; it is contrary to this Court's opinion in this case and eliminates the discretion granted by it to local courts. It is important that this Court now reestablish that area of discretion; otherwise in large areas of Virginia and perhaps in other States public schools are now in their last session.

VII.

CONCLUSION

The writ of certiorari should be awarded in this case and the action of the Circuit Court should be reversed. It is only by such action that the Court can preserve the discretionary powers of the District Courts that it was at such pains to establish.

Dated December 31, 1957.

Respectfully submitted,

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APPENDIX A

Opinion of the United States District Court for the Eastern District of Virginia

Opinion of the United States District Court for the Eastern District of Virginia

HUTCHESON, Chief Judge: This case originated in the Richmond Division upon the filing of a complaint on May 21, 1951. The declared object of the complaint was, in substance, to obtain a declaratory judgment holding that segregation of pupils in the public schools in the county by races constituted discrimination in violation of the Fourteenth Amendment to the Constitution of the United States. There were also allegations concerning the inequality of school facilities, which last constituted a somewhat unimportant part of the controversy.

The case was heard February 25-29, 1952, by a three-judge court, which had been convened in accordance with the provisions of the statute. The opinion of that Court was filed on March 7, 1952, and is reported in *103 Fed. Supp. 337*. An appeal was allowed on May 5, 1952, and on May 17, 1954, the Supreme Court handed down its opinion, reversing the findings and conclusions of this Court, the case having been consolidated with four other cases then pending before it. See *Brown* v. *Board of Education, 347 U. S., 483*. At the suggestion of the Court the case was further argued as to specific questions hereafter more fully discussed, and the Court filed its second opinion on May 31, 1955. *349 U. S., 294*. The mandate having been received by this Court on June 28, 1955, the case was called for further proceedings and on July 18, 1955, the three-judge court entered an order directing compliance with the terms of the mandate, but finding that it was not practicable to effect a change in the operation of the public schools of the county during the session beginning September 1955.

On April 23, 1956, plaintiffs filed a motion seeking an

order fixing a time limit within which compliance with the order should be had, to which answer of the defendants was filed on June 29, 1956. On July 9, 1956, the three-judge court was reconvened and, pursuant to order previously entered, heard argument on the sole question of whether it should continue to function or if the case should be returned to the resident District Judge in whose division suit was instituted. On July 19, 1956, the Court announced its unanimous decision that since the constitutional question involved had been determined, the three-judge court should no longer function and the matter should be heard by the resident District Judge. On October 17, 1956, defendants filed a motion seeking the dismissal of the case upon the ground that the General Assembly of Virginia in extra session 1956 had provided the plaintiffs an adequate remedy at law in the courts of the Commonwealth.

The respective motions were argued on November 14, 1956, and the case is now before me as the resident District Judge for disposition of the motions upon the pleadings and certain exhibits which have been filed pertaining to the motions.

I am mindful that other District Courts have dealt with similar cases but in each case the Court was dealing with the record before it and with the problems of the particular locality affected by its order. Consequently, those decisions afford little, if any, aid in dealing with this case.

The questions raised by the supplemental answer and motion to dismiss the motion for further relief filed by the defendants on October 17, 1956, and the arguments thereon, may be stated as follows:

(a) Should the three-judge District Court be reconvened?

(b) Are certain statutes passed by the General Assembly of Virginia in extra session 1956 constitutional?; and

(c) Should plaintiffs be required to exhaust administrative remedies provided by the state statutes?

I shall first consider the questions presented in the last mentioned motion in the order stated.

From an examination of the applicable statute (*Title 28, Section 2281, United States Code*), and upon consideration of its purpose I reach the conclusion that in the present state of the record in this case it is not appropriate to request the convening of a three-judge court. There is no application before me for an order to restrain or enjoin the action of any officer of the state in the enforcement or execution of any state statute or order such as contemplated by the Act of Congress.

In the present state of the record of this particular case I do not consider the constitutionality of the state statutes referred to or the relief there provided proper subjects of inquiry. They were the subject of argument at the hearing on November 14, 1956, and I shall dispose of the questions so raised without extended discussion.

The situation before me was aptly summed up by Judge Parker in *Carson* v. *Warlick*, decided November 14, 1956, in which he used the following language:

> "It is argued that the Pupil Enrollment Act is unconstitutional; but we can not hold that that statute is unconstitutional upon its face and the question as to whether it has been unconstitutionally applied is not before us, as the administrative remedy which it provides has not been invoked."

And further:

"It is to be presumed that these (the officials of the schools and the school boards) will obey the law, observe the standard prescribed by the legislature, and avoid the discrimination on account of race which the Constitution forbids. Not until they have been applied to and have failed to give relief should the courts be asked to interfere in school administration. As said by the Supreme Court in *Brown, et al* v. *Board of Education, et al*, 349 U. S., 294, 299:

"'School authorities have the primary responsibility for elucidating, assessing and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles.'"

The opinion in *The School Board of the City of Charlottesville, et al* v. *Doris Marie Allen, et al, and County School Board of Arlington County, Virginia, et al* v. *Clarissa S. Thompson, et al (4th Cir.) decided December 31, 1956*, contains language pertinent here. The Court again speaking through Chief Judge Parker, in referring to administrative remedies provided under Section 22-27 of the Code of Virginia, and after pointing out that the pupil placement law recently enacted by the General Assembly of Virginia had not become effective when the cases were heard (although it was effective at the time that opinion was rendered, as is the situation here) said:

"* * *. Reliance is placed upon our decision in *Carson* v. *Warlick*, 4 Cir. F. 2d. . In that case, however, an adequate administrative remedy had been prescribed by statute, the plaintiffs there had failed

to pursue the remedy as outlined in the decision of the Supreme Court of the State and *there was nothing upon which a court could say that if they had followed such remedy their rights under the Constitution would have been denied them.*" (Emphasis supplied)

See also *Hood* v. *Board of Trustees, etc.*, 232 Fed. (2d), 626 (4th Cir.), and *Robinson* v. *Board of Education, etc.*, 143 Fed. Supp., 481 (District of Maryland).

The quoted language appears in point in so far as the constitutional question is concerned. While the statutes involved are not identical, the principle announced is applicable.

Turning to the proposal that the plaintiffs be required to exhaust the administrative remedies provided by the state statutes, I am again confronted by the record before me. Being of opinion I am not in a position to pass upon the constitutionality of the statutes setting up the administrative remedy, it is my thought that I should not undertake to require the plaintiffs to seek any particular remedy. They are free to do so and thereby test the constitutionality of the statutes should they desire. However, that is a right, not an obligation. In the meantime, this is a matter of school administration in which I should not interfere.

It follows that the motion of the defendants to dismiss the motion for further relief should not be granted at this time. However, I incline to the view that instead of being dismissed it should be retained on the docket of the Court for final disposition at a later time should further proceedings develop an issue properly determinable in this case.

In undertaking to approach a solution to the troublesome problems involved in this case which are presented by the record and properly before me for determination, including the motion for further relief filed by the plaintiffs, it is to

be borne in mind that the Supreme Court has decided only one legal principle which is concisely stated in the syllabus appearing in *347 U. S., 483*, as follows:

> "Segregation of white and Negro children in the public schools of a state solely on the basis of race, pursuant to state laws permitting or requiring such segregation, denies to negro children the equal protection of the laws guaranteed by the Fourteenth Amendment * * *."

A study of the opinions of May 17, 1954, and May 31, 1955, reveals no other principle of law to serve as precedent or landmark in undertaking to apply the law to the facts, although certain well-recognized equitable principles are mentioned. For a clearer understanding of the question here presented, some discussion of those opinions at this point may be helpful.

In the 1954 opinion, which will be referred to as the First Brown Case, at page 495, the Court, after stating that "because of the wide applicability of this decision, and because of the great variety of local conditions, the formulation of decrees in these cases presents problems of considerable complexity", requested counsel to present further argument on questions which may be briefly summarized as follows: Whether a decree would necessarily follow providing that negro children should forthwith be admitted to schools of their choice, or whether the Court should permit an effective gradual adjustment to be brought about to a system not based on color distinctions; whether the Supreme Court should formulate detailed decrees in the cases; if so, what specific issues should be reached thereby; if the appointment of a special master to hear evidence with a view of recommending specific terms for the decrees

would be desirable; and finally, whether that Court should remand the cases to the courts of first instance with directions to frame decrees, and if that policy were followed, what general directions should the decrees of the Supreme Court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees. For full text of the questions propounded and argued see *345 U. S., 972*.

Following elaborate argument upon these questions, in which the Attorneys General of the affected states and the Solicitor General of the United States presented their views, the Court filed its opinion on May 31, 1955, which will be referred to as the Second Brown Case. With knowledge of what was considered by the Court, as revealed by the questions, the language of the opinion in the Second Brown Case takes on added significance, both with respect to what was not said as well as to what was said. Certain portions of that opinion follow:

> "Full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal. Accordingly, we believe it appropriate to remand the cases to those courts."

The Court then proceeded to announce the following principles which should receive attention of the District Courts:

"In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of these traditional attributes of equity power. At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis. To effectuate this interest may call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in our May 17, 1954, decision. Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner. But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them."

From the foregoing it is clear that the law must be enforced but the Court is acutely conscious of the variety of problems of a local nature constituting factors to be considered in the enforcement. Further emphasis upon this point is found on *page 298*, where the Court said:

"Because these cases arose under different local conditions and their disposition will involve a variety of local problems, we requested further argument on the question of relief."

Bearing in mind that the only legal issue in this case pertains to a right guaranteed by the Constitution, this language coupled with the action of the Court, takes on

significance which can hardly be over emphasized. It is elementary law that one deprived of a right guaranteed by the Constitution ordinarily is afforded immediate relief. Notwithstanding this fundamental principle, the Supreme Court in this case has seen fit to specifically declare that while the plaintiffs are entitled to the exercise of a constitutional right, in view of the grave and perplexing problems involved, the exercise of that right must be deferred. With that declaration the Court used equally forceful language indicating that it realizes that conditions vary in different localities. Consequently, instead of simply declaring the right and entering a mandate accordingly, it has seen fit in the exercise of its equity powers to not only defer until a later date the time when the right may be exercised, but to clearly indicate that the time of exercising such right may vary with conditions. A realization of the effect of this action on the part of the Court is of supreme importance to an understanding of the course to be pursued by the Courts of first instance. At the risk of being repetitious, I again recall that: Before laying down those principles, the Court considered and rejected the suggestion that negro children should be forthwith admitted to schools of their choice; rejected the suggestion that it formulate detailed decrees; rejected the suggestion that a special master be appointed by it to hear evidence with a view to recommending specific terms for such decrees and adopted the proposal that the Court in the exercise of equity powers direct an effective gradual adjustment under the order of the Courts of first instance. Further, the Court considered and rejected the suggestion that a specified rule of procedure be established for the District Courts but placed upon those Courts the responsibility of considering, weighing and being guided by conditions found to prevail in each of the several communities to be affected by their decrees.

In the absence of precedent, in undertaking to follow the mandate of the Supreme Court, the District Courts are confronted with the necessity of following an uncharted course in applying the sole legal principle announced in the First Brown Case. One idea which emerges clearly is that procedural rules adopted in one locality may be altogether inapplicable to conditions in another.

Boiled down to its essence, in the Second Brown Case the Court after pointing out that the local school authorities have the primary responsibility of finding a solution to the varied local problems, proceeded to observe that the District Courts are to consider whether the actions of the local authorities are in good faith; and that by reason of their proximity to local conditions those Courts can best appraise the conduct of the local authorities. It is then pointed out that in so appraising, the Courts should be guided by the traditionally flexible principles of equity for adjusting and reconciling public and private needs. To be considered is the personal interest of the plaintiffs, as well as the public interest in the elimination of obstacles in a systematic and effective manner. During this period the Courts should retain jurisdiction of the cases. The Court has here clearly and in unmistakable terms placed upon the District Judges the responsibility of weighing the various factors which prevail in the respective localities affected. There is here a recognition of the obvious fact that in one locality in which conditions permit, a change may be effected almost immediately. In other localities a specified period appropriate in each case may be feasible and a definite time limit fixed accordingly. In yet other communities, a greater time for compliance may be found necessary. It is clear that the Court anticipated the application of a test of expediency in such cases so that an orderly change may be accomplished

without causing a sudden disruption of the way of life of the multitude of people affected.

While the Supreme Court made no reference to yet another interest, there is one of a semi-public nature. This involves the teachers of the county, both white and colored, and their families, dependent upon them for support.

The conflicting rights and interests of racial and national groups in this country is nothing new. It is not confined to the negro race but numerous illustrations might be used. A striking illustration is found in the situation of persons of Oriental origin who have come to this country. It is worthy of passing note to recall that the opinion appearing in the official reports immediately preceding the First Brown Case involves the rights of persons of Mexican descent. *Hernández v. Texas*, 347 U. S., 475. It must be borne in mind that these conflicts and the cases arising therefrom are the result of customs, traditions, manners and emotions which have existed for generations. In this particular case the customs to be changed have been not only generally accepted but repeatedly and expressly declared the law of the land since 1896.[1] While lawyers may have been conscious of the evolution of the law during this period and prepared to anticipate the possibility of a change, the average layman affected may not be charged with such prescience. Patience, time and a sympathetic approach are imperative to accomplish a change of conditions in an orderly and peaceful manner and with a minimum of friction.

In seeking a solution it is necessary to know and to understand the background upon which the factual situation is cast. In this connection it is necessary to examine briefly the present conditions in Prince Edward County, Virginia.

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[1] *Plessy v. Ferguson*, 163 U. S., 537; *Gong Lum v. Rice*, 275 U. S., 78.

historically and as revealed by the record in this case.[2]

Prince Edward County being inland from the easily navigable tidal reaches of the streams watering that region, was not settled until the first half of the 18th century, after the power of the Indians had been broken. At that time the pattern of life in the Colony had become established and the early residents carried with them the manners and customs prevailing in the more populous regions of Virginia. By 1783 the population consisted of 1,552 white and 1,468 colored residents. The 1950 census showed a population of 15,396, with the white and colored races approximately equal in number. During the intervening years the relations between the races have been harmonious, with a minimum of friction and tension as compared with some regions. During several decades prior to the War Between the States the processes of orderly and gradual adjustment which were becoming increasingly evident were interrupted by being involved in the political issues confronting the growing nation, with particular reference to regional differences and the clash of economic rivalries of various sections. Unfortunately this resulted in accentuating racial tension and hostility which became somewhat acute at times. While these conditions were common to the southeastern and southern parts of the country, it was felt less in Prince Edward and the surrounding area than in many other sections.

In the days following 1861-65 the entire section was poverty stricken. For the rank and file of both races there was a struggle for existence and education was of secondary importance. It is true that in this situation with the local government controlled by members of the white race and

[2] See "History of Prince Edward County, Virginia"—Herbert Clarence Bradshaw—1955.

with severely limited means, there was inequality in the division, but members of the negro race were not excluded from sharing, although to a lesser extent. This was due in part to an understandable, if erroneous, feeling that those upon whom the greater tax burden fell should receive the greater benefit. During the second quarter of the present century the economy of the section most seriously concerned has shown a marked improvement. Due to that improvement, corresponding advantages have resulted in housing, education and knowledge on the part of both races. Marked improvement in racial relationship resulted although many firmly fixed ancient customs and manners remain. With an improvement in the economic condition of the county and the resulting increase in available financial resources, an awareness of public sentiment, the mandatory requirements of the Virginia constitution and statutes upon the subject, coupled with suits brought in Federal Courts in other localities, the responsible authorities of Prince Edward County made plans for the erection of new school buildings exclusively for negroes, which are now concededly equal if not superior to those occupied by the white pupils.

Before these plans could be completed, this suit was filed. Since the decision in the Brown case these plans have been completed. The defendants, who are the Superintendent and members of the School Board, and as such charged with the "primary responsibility for elucidating, assessing and solving" their problems, have proceeded with the operation of the schools in the county in accordance with the practice which has prevailed. They have prepared and submitted to the Board of Supervisors of the county annual budgets for the operation of the schools. In this connection it is to be borne in mind that the defendants have no authority under the law to levy or assess taxes nor to raise funds except in a limited manner by borrowing under certain con-

ditions not pertinent here. Responsibility for providing local funds for the operation of schools rests upon the Board of Supervisors who are not defendants before this Court. The School Board consists of members appointed by the school trustee electoral board, the members of which in turn are appointed by the local state court. The members of the Board of Supervisors are elected by the people. Buttressed by popular demand of the people of the county since the decision in the First Brown Case, evidence in part by a petition signed by more than 4,000 residents, the Board of Supervisors has declined to allocate funds for the operation of schools on an annual basis. Instead it appropriates the necessary operating expenses on a monthly basis, with a publically declared intention of discontinuing such appropriation if schools in the county are mixed racially at this time. In this connection attention is invited to the statutes recently enacted by the Virginia General Assembly under which the funds provided by the state may be withheld. Pending final interpretation of those statutes, time valuable in the educational opportunities of the children involved might be irretrievably lost. Affidavits filed in this case and in no way controverted or mentioned by counsel for the plaintiffs, declare racial relations in the county to be more strained than at any time during the present generation.

In this state of facts I am called upon to fix a time when the defendants should be required to comply with the terms of the injunction issued by the three-judge court in obedience to the mandate of the Supreme Court. To do this I am to "adjust and reconcile public and private needs", by weighing and considering the personal interests of the plaintiffs as well as the interest of the public, in the elimination of obstacles in order that there may be a systematic, orderly and effective transition of the school system in accordance with the constitutional principles announced in the Brown case.

I believe the problems to be capable of solution but they will require patience, time and a sympathetic understanding. They can not be solved by zealous advocates, by an emotional approach, nor by those with selfish interests to advance. The law has been announced by the Supreme Court and must be observed but the solution must be discovered by those affected under the guidance of sensible leadership. These facts should be self evident to all responsible people.

The children of both races, constituting an entire generation of this county, are the persons to be affected by whatever action may be taken and it follows that theirs is the real interest at stake, although closely connected with that of their parents and guardians.

Should the public schools of the county be closed for any reason, approximately three thousand children, including those of an age at which they are peculiarly impressionable, will be released from attendance. An interrupted education of one year or even six months at that age places a serious handicap upon the child which the average one may not overcome. Among those of the older group there are some for whom it will mean the end of an education. Should the schools be resumed after an interruption, those among the younger group will be retarded in acquiring an education as compared with their contemporaries in other communities. With the release from discipline brought about by compulsory attendance at school, problems concerning juvenile conduct will be intensified with resulting injury to both children and the community and a resulting increase of racial tension with members of each race blaming the other for the lack of schools. In this connection it is to be remembered that the police protection of rural communities is different from that afforded in more populous areas. The salaries paid teachers in the state are not such as to enable them to accumulate a fund sufficient to support

themselves and their families over a protracted period of unemployment. Loss of employment would be a serious consequence to many teachers of both races who are established in the community. Tentative and substantial plans have been made for continuation by private means of the education of white children of the county. There is no such provision for negro children. These considerations all involve the public and private interests of the community as distinguished from the quandary of the members of the School Board.

The admonition of the Supreme Court that the personal interests of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis is a consideration of which I am mindful. In response to a question from the bench, counsel for the plaintiffs stated that so far as he knew none of the original plaintiffs are now attending the schools. However, additional named plaintiffs have intervened and it is to be recalled that this is a class action. Should the plaintiffs be deprived of education or suffer an interruption in their education they will be handicapped. Concededly, their opportunities in so far as physical equipment and curriculum are concerned, are equal if not superior to those available to children of the white race. It has been held by the Court that segregation of white and colored children in public schools has a detrimental psychological effect upon the colored children. That is primarily the basis upon which the Brown case is founded. It is my belief that at this time a continuation of present methods could not be so harmful as an interrupted education.

Laying aside for the moment the probability of the schools being closed, in the present state of unrest and racial tension in the county it would be unwise to attempt to force a change of the system until the entire situation can be considered and adjustments gradually brought about. This must be accomplished by the reasonable, clear-thinking people of

both races in that locality. This objective can not be achieved quickly. It does not require the opinion of a psychologist to understand that disaffection, uneasiness and uncertainty of the adult world around them creates emotional problems for children concerned. A sudden disruption of reasonably amicable racial relations which have been laboriously built up over a period of more than three and a quarter centuries would be deplorable. At any reasonable cost, it must be avoided.

I conceive the immediate problems of the Court to be to determine whether the School Board is acting in good faith and whether the facts before the Court at this time are such that an order fixing a time limit for compliance with the decree is proper, taking into consideration the various factors outlined in the Brown case to which consideration has been given. I do not conceive it to be within the power of this Court to forecast conditions which may exist in the future. Stated differently, I must reach a conclusion based upon the facts existing at this time in the locality to be affected.

The passage of time with apparent inaction on the part of the defendants of itself does not necessarily show non-compliance. This is illustrated by the fact that after the appeal in this case was granted in May, 1952, more than three years elapsed before the mandate of the Supreme Court was received. I find that the defendants by submitting the usual budget requesting appropriations have done all that reasonably could be required of them in this period of transition. Action which might cause mixing the schools at this time, resulting in closing them, would be highly and permanently injurious to children of both races. Relations between the members of the two races in the county would be adversely affected and a final solution of the vexing problems delayed as a consequence.

At this time the children of both races are being afforded opportunities for an education under an adequate system that has been formulated over the years. If an order should result in racially integrated schools, the school system of itself would change greatly. Plans should be made to keep within bounds the automatic adjustments that would follow in order that society not be too drastically affected.

Many minds are now engaged in seeking an equitable solution of the problem, including those of the defendants. As was said by a great statesman, "The march of the human mind is slow".[3] It is inconceivable that any of the litigants or other persons affected would willingly see the public school system abolished or an interruption in the education of the children of the county. Either result would be disastrous to both public and private interests of the county.

It is imperative that additional time be allowed the defendants in this case, who find themselves in a position of helplessness unless the Court considers their situation from an equitable and reasonable viewpoint.

Considering all the factors, it is my conclusion that decision of the motion for further relief filed by the plaintiffs should be withheld at this time, with the reservation to the plaintiffs of the right to renew the motion at a later date after the defendants have been afforded a reasonable time to effect a solution.

In conclusion, attention is again called to the following language of the Supreme Court which is the law of this case and must be observed:

> "But it should go without saying that the vitality of these constitutional principles can not be allowed to yield simply because of disagreement with them."

[3] Edmund Burke—"Speech on the Conciliation of America."

APPENDIX B

Opinion of the United States Court of Appeals for the Fourth Circuit

Opinion of the United States Court of Appeals for the Fourth Circuit

Before PARKER, Chief Judge, HAYNSWORTH, Circuit Judge, and HARRY E. WATKINS, District Judge.

PER CURIAM:

This action was commenced to enjoin racial segregation in the public schools of Prince Edward County, Virginia, on the ground that provisions of the state constitution and statutory code requiring such segregation were violative of the 14th Amendment to the Constitution of the United States and therefore void. A court of three judges was properly constituted, as required by 28 USC sections 2281 and 2284, and judgment was entered denying the relief sought. See *Davis* v. *County School Board of Prince Edward County*, D. C., 103 F. Supp. 337. This judgment was reversed by the Supreme Court and the case was remanded for further proceedings. *Brown* v. *Board of Education of Topeka*, 347 U. S. 483, 74 S. Ct. 686, 98 L. Ed. 1083. On the remand the court of three judges entered a decree which vacated and set aside its original decree, declared invalid the constitutional and statutory provisions requiring segregation in the schools, and enjoined and restrained the defendants from refusing on account of race or color to admit to any school under their supervision any child qualified to enter such school "from and after such time as the defendants may have made the necessary arrangements for admission of children to such school on a nondiscriminatory basis with all deliberate speed as required by the decision of the Supreme Court in this cause". The court found that it would not be practicable to require that this provision be made effective before the commencement of the school term

order was not otherwise affected. The case was retained on the docket for the entry of further orders which might be necessary in the enforcement of the decree. In July, 1956 the court of three judges was dissolved and order was entered that further proceedings in the case be had before a single District Judge. *Davis* v. *County School Board of Prince Edward County*, D. C., 142 F. Supp. 616.

After the dissolution of the three judge court, the case came on for hearing before the District Judge on a motion of plaintiffs for an order fixing a time limit for compliance with the order theretofore entered, and a motion of defendants that the motions of plaintiff be dismissed for failure to comply with the Pupil Placement Act, ch. 70 of the Acts of Assembly of Virginia, Extra Session 1956. On the hearing of the motions, the question was raised as to whether the court of three judges should be reconvened. The District Judge held that the court of three judges need not be reconvened, declined to pass on the applicability of the Pupil Placement Act, and denied the motion for an order fixing a time limit for compliance with the order theretofore entered because of opposition to the order and racial tension prevailing in the community and the possible closing of the schools under Virginia Statutes, if the order were enforced.

The holding of the judge that the three judge court need not be reconvened was unquestionably correct. We have recently held, however, that the Pupil Placement Act provides no adequate administrative remedy. *School Board of Newport News* v. *Atkins*, 4 Cir., 246 F. 2d 325, cert. den. U. S. ( ); and we think that the District Judge was in error in not fixing a time limit for compliance with the order theretofore entered in the cause. As pointed out by Judge Joseph C. Hutcheson of Texas in *Jackson* v. *Rozelon*, 5 Cir., 235 F. 2d 93, 96, plaintiffs were entitled to have the school board "acting promptly, and completely uninfluenced

by private and public opinion as to the desirability of desegregation in the community, proceed with deliberate speed consistent with administration * * *." We quoted this with approval in *School Board of City of Charlottesville* v. *Allen*, 4 Cir., 240 F. 2d 59, 64, where we said:

> "It had been two years since the first decision of the Supreme Court in Brown v. Board of Education and, despite repeated demands upon them, the boards of education had taken no steps towards removing the requirement of segregation in the schools which the Supreme Court had held violative of the constitutional rights of the plaintiffs. This was not 'deliberate speed' in complying with the law as laid down by the Supreme Court but was clear manifestation of an attitude of intransigence, which justified the issuance of the injunctions to dispel the misapprehension of school authorities as to their obligations under the law and to bring about their prompt compliance with constitutional requirements as interpreted by the Supreme Court."

In the case at bar the order entered on June 29, 1955, while finding that it was impracticable to place the schools on a nondiscriminatory basis before September 1955, enjoined the defendants "from refusing on account of race or color to admit to any school under their supervision any child qualified to enter such school, from and after such time as the defendants may have made the necessary arrangements for admission of children to such school on a nondiscriminatory basis with all deliberate speed as required by the decision of the Supreme Court in this cause." More than a year and a half had elapsed after the entry of this order, the school year of 1955-56 had come and gone,

another school year had been entered, and no steps had been taken to comply with the order. The time had unquestionably come to say plainly to the defendants that they must comply without further delay.

This does not mean that the defendants should require mixing of white and Negro children in the schools but merely that they should abolish the requirement of discrimination. If the children of the different races should voluntarily attend different schools, this would not be violative of the Constitution or of the court's order, so long as there was no requirement of the school authorities to that effect. Furthermore, it would not be necessary for the requirement as to segregation to be removed at once with respect to all grades in the schools, if a reasonable start were made to that end with "deliberate speed" considering the problems of proper administration. See order in the Arlington case, approved by this court, 240 F. 2d at 61, also *Aaron* v. *Cooper*, 8 Cir. 243 F. 2d 361.

The fact that the schools might be closed if the order were enforced is no reason for not enforcing it. A person may not be denied enforcement of rights to which he is entitled under the Constitution of the United States because of action taken or threatened in defiance of such rights.

The order appealed from will accordingly be reversed and the case will be remanded to the court below with direction to enter an order directing defendants to make a prompt and reasonable start toward complying with the court's order enjoining discrimination on the ground of race or color in admitting children to the schools under their supervision.

Reversed and Remanded with Directions.